Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

No. 85-2134

ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, EXECUTOR,
Petitioner,

v.

JOHN J. BUCKLEY, ET AL.,
Respondents.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS ROBERT FEIN, DENNIS KOSON AND JAMES GILLIGAN IN OPPOSITION TO PETITION FOR CERTIORARI

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ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, EXECUTOR,
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v.

JOHN J. BUCKLEY, ET AL.,
Respondents.

The respondents Robert Fein, Dennis Koson and James Gilligan respectfully request that this Court deny the petition for writ of certiorari seeking review of the First Circuit's opinion in this case. That opinion is reported at 787 F.2d 714 (1st Cir. 1986).

STATEMENT OF THE CASE

The respondents adopt the statement of the facts set forth in the opinion below at 787 F.2d 714, 715-718.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE FIRST CIRCUIT'S OPINION IN GILMORE V. BUCKLEY IS NEITHER IN ERROR NOR IN CONFLICT WITH THE THIRD, FOURTH AND ELEVENTH CIRCUITS.

The sole question presented in the petition is whether the First Circuit erred in holding that plaintiff failed to state a claim under 42 U.S.C. §1983 where some of the state and county defendants knew or should have known that a prisoner posed a special danger to Patricia Gilmore who was murdered by the prisoner the day after his release on furlough from a county facility. Petitioner seeks certiorari on the basis that there is a conflict between the First Circuit and the Third, Fourth and Eleventh Circuits, asserting that the latter courts of appeals hold that a state defendant's knowledge that a third

party poses a special danger to an identified victim will alone support a claim for violation of due process under 42 U.S.C. §1983. (Petition 11).

The First Circuit held in this case that the plaintiff had not made out a cause of action under the Fourteenth Amendment, where the victim died at the hands of a private individual who was neither an agent of the state nor employed by the state and where the victim, not in the state's custody or control, did not stand in any "special relationship" with the state. Gilmore v. Buckley, 787 F.2d 714, 720-722 (1st Cir. 1986). The court did not accept the argument that a constitutional duty to protect Gilmore arose solely "because at least some of the defendants knew or

should have known that Prendergast posed a special danger to her." Id. at 721. This holding is correctly based on the historical function of the Fourteenth Amendment and on Martinez v. California, 444 U.S. 277 (1980) and its progeny. It is not in conflict with the Third, Fourth and Eleventh Circuits.

By its express language the Fourteenth Amendment provides in part "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The purpose of the Fourteenth Amendment was, and is, to prevent governmental power from "being used for purposes of oppression," Daniels v. Williams, ____ U.S. ____, 106 S.Ct. 662, 665 (1986) (citation omitted) and to protect individuals from affirmative

abuse of power by state officials. Daniels v. Williams, 106 S.Ct. at 664-665; Davidson v. Cannon, ____ U.S. ____, 106 S.Ct. 668, 670 (1986), Monroe v. Pape, 365 U.S. 167, 172 (1961).

This is a rule of substantive constitutional law, Lugar v. Edmonson Oil, 457 U.S. 922, 936 (1982) long adhered to by this Court. See, e.g., Civil Rights Cases, 109 U.S. 3, 11, 17-18 (1883) affirming the essential dichotomy set forth in that Amendment between deprivation by the state, subject to scrutiny under its provisions, and private conduct "however discriminatory or wrongful," against which the Fourteenth Amendment offers no shield. Shelley v. Kraemer, 334 U.S. 1 (1948).

As explained in Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982):

> There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. (citation omitted). But there is no constitutional right to be protected by the State against being murdered by criminals or madmen. . . . The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

This was the fundamental basis for this Court's holding in Martinez and for the First Circuit's holding below.

In Martinez this Court took as true allegations that a parole board recklessly, willfully and wantonly released a dangerous criminal whose release the parole board knew to create

a clear and present danger that the parolee would murder someone. Martinez, 444 U.S. at 280. Notwithstanding these allegations it was held that the parole board did not "deprive" plaintiff's decedent of life within the meaning of the Fourteenth Amendment. Id. at 285.

> [T]he Fourteenth Amendment protected [decedent] only from deprivation by the "State . . . of life. . . without due process of law." Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action...
>
> Her life was taken by the parolee five months after his release. He was in no sense an agent of the parole board. Cf. Scheuer v. Rhodes, 416 U.S. 232. (Footnote omitted.)

Accordingly, a number of courts of appeals have, since Martinez, agreed that "in general, there simply is 'no

constitutional right to be protected by the state against criminals or madmen,' and that because, in corollary, there is no constitutional duty [on the state] to provide such protection, its failure to do so is not actionable under section 1983." Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983) quoting Bowers v. DeVito, supra, at 618. 1/

There is language in some of these cases that a constitutional right of protection under the due process clause

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1/ See, also, Jones v. Phyler, 761 F.2d 642 , 646-647 (11th Cir. 1985); Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984); Jackson v. City of Joliet, 715 F.2d 1200, 1203-1204, 1206 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984); Wright v. City of Ozark, 715 F.2d 1513, 1516 (11th Cir. 1983); Jensen v. Conrad, 747 F.2d 185, 193 (4th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 1754 (1985).

"may arise out of special custodial or other relationships created or assumed by the state in respect of particular persons." Fox v. Custis, 712 F.2d at 88 (4th Cir. 1983) (emphasis in original); Gilmore, 787 F.2d at 720.

For example, Bowers suggested that such a duty may arise where the state takes an active role in putting a person in danger from private persons "and then fails to protect him." Bowers v. DeVito, 686 F.2d at 618. See, e.g., White v. Rochford, 592 F.2d 381 (7th Cir. 1979) where police abandoned three children in an automobile after arresting and taking away their custodian. In Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), the Fourth Circuit suggested the following factors to assist in determining the

type of "special relationship" which could remove a situation from the general rule against an affirmative, constitutionally based duty to the public: 1) whether the victim or perpetrator was or had been in legal custody at the time of the incident; 2) whether the state has expressly indicated a desire "to provide affirmative protection to a particular class or specific individuals" and 3) whether the state knew of the claimant's plight. Id. at 194-195, n.11.

Petitioner's reliance on Jensen for the proposition that the Court held that the existence of the third factor alone is itself enough to find a "special relationship" is misplaced. To the contrary, Jensen suggests in dicta, an evaluation of all three factors, not

exclusive reliance on the third, to determine the existence of a special relationship. At most, the court stated merely that the knowledge of the state defendants of the victim's plight "would strengthen the argument that some sort of special relationship had been established." Id. at 195, n.11, and then decided the case on grounds of qualified immunity without determining whether a special relationship in fact existed. Jensen thus does not present a conflict "real or intolerable" with the First Circuit. Rice v. Sioux City Cemetary, 349 U.S. 70, 79 (1955).

All courts of appeals which have found an affirmative duty to protect have done so in cases which involve a prison or institutional setting, see

Gilmore, 787 F.2d at 720-721 (collecting cases), or where the state has otherwise undertaken a custodial role concerning the victim, Doe v. New York City Department of Social Services, 709 F.2d 782 (2nd Cir. 1981) cert. denied, 464 U.S. 864 (1983) (child placed by state agency in foster home abused by foster parent); Estate of Bailey v. County of York, 768 F.2d 503 (3rd Cir. 1985); Jensen v. Conrad, 747 F.2d at 187-188 (state agency entered into agreement with abusive mother that child and mother reside with grandmother but failed to enforce the agreement).

Bailey, supra and Jensen, supra are distinguishable on their facts and do not support petitioner's claim that the Third and Fourth Circuits are in conflict with the First Circuit's opinion. Neither

Bailey nor Jensen holds that knowledge by the state defendants of the victim's plight alone is the decisive factor which creates a "special relationship" and an affirmative duty to protect the victim under the Due Process Clause.

Nor does the Eleventh Circuit in Jones v. Pryfer, 761 F.2d 642 (11th Cir. 1985). In Jones, plaintiff claimed that a special relationship was created because she was the forseeable victim of a rape by a prisoner just released on furlough. The court found that it was not sufficient to establish a special relationship where the prisoner had broken into plaintiff's house and where she was instrumental in having him convicted and sentenced. Although the court noted the importance of the factor

of knowledge of a victim's plight, the holding in Jones, supra is that all circumstances of the particular case should be taken into account. ("Plaintiff has not established the required special relationship, based on the interactions of the victim, Brown, and the Department of Youth Services to invoke the due process protection of the Fourteenth Amendment.") Id. at 647. Accord, Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983).

There can be no assertion in this case that the state, as personified by the state psychiatrists, had assumed by statute or conduct any special relationship with Patricia Gilmore which involved providing for her safety, as opposed to

the safety of a member of the general public.[2/]

2/ Petitioners argued below that Massachusetts law on commitment proceedings establishes such a duty. That argument is misplaced. If anything, as noted by the district court, the duty has been seen as one of not violating the right of the patient not to be improperly committed. Gilmore v. Buckley, 608 F.Supp. 554, 561 (D. Ma. 1985). Mass. Gen. Laws c.123, §15(e) authorizes the petition for commitment; it does not require it. Gilmore v. Buckley, 787 F.2d at 716, n.2, 722 n.14. Petitioner asserts in this Court for the first time that provisions of the Massachusetts Constitution (its Preamble and articles 5, 7, and 10 of the Declaration of Rights) somehow give rise to a federal constitutional duty to protect. The theory was never raised or argued in the district court or the court of appeals and will therefore not be reviewed here absent exceptional circumstances. Lawn v. United States, 355 U.S. 339, 362, n.16 (1957). Nor is the assertion supported by any citation to authority interpreting the provisions; instead petitioner merely recites them. For this reason alone, the argument should not be considered. Id. at 363, n.13.

The state psychiatrists had no custody or control over Gilmore. Nor did they or the county defendants "strip her of her capacity to defend herself or affirmatively place her in a position of danger that she would not otherwise have been in." Gilmore, 787 F.2d at 722.

While Doctors Fein and Koson were well aware of Patricia Gilmore's status as a possible victim of Prendergast, so was she; this is not a case where a failure to warn her about Prendergast could be considered to have placed her in a position of danger. Cf. Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984).

Nor did Bridgewater State Hospital have a custodial relationship with regard to Prendergast at the time of the murder or even while he was there for evaluation in aid of sentencing.

Prendergast was actually in the legal custody of the district court. Mass. Gen. Laws c.123, §15(e). The state psychiatrists knew Prendergast would be remanded to the custody of the district court for sentencing and incarceration. The lack of commitment did not provide Prendergast with any direct opportunity to harm Gilmore.[3/]

The First Circuit held, in accord with the rationale of Martinez, that

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3/ Beck v. Kansas University Psychiatry Foundation, 580 F.Supp. 527 (D. Kansas 1984), relied upon by petitioner, in reality undermines his argument, in that the psychiatrists who treated the murderer in that case were found not to have any liability because of their lack of custody and control over him at the time of his release. Moreover, the court in Beck erroneously based its finding of a constitutional duty on Kansas tort law.

absent such a special relationship in respect of Gilmore and the concomitant duty under the Fourteenth Amendment to provide protection of that person, the fact that the state and county defendants knew Gilmore to be a potential victim did not in and of itself convert Prendergast's murder of Gilmore into state action. Prendergast was simply not an agent of the state or county defendants. Those officials did not "create[] the threat" he posed to Gilmore; they neither "condoned, encouraged nor "ratified" his behavior.[4/] Gilmore,

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4/ See, Blum v. Yaretsky, 457 U.S. at 1004-1005 (state normally can be held responsible under Fourteenth Amendment for a private decision only when it has exercised coercive power or has provided significant encouragement, either overt or covert, that the choice in law be deemed that of the State); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

787 F.2d at 722; Cf. Martinez, 444 U.S. at 285; Beard v. O'Neal, 728 F.2d 894, 899 (7th Cir.), cert. denied, ____ U.S. ____, 105 S.Ct. 104 (1984).

The First Circuit therefore found that knowledge by the state and county defendants of Gilmore's plight, although relevant, went more toward the issue of state tort law concerning a "'duty' to avoid harm to his victim or to have proximately caused her death" Martinez, 444 U.S. at 285; concepts which are not the touchstone of the Due Process Clause and which do not reflect its overarching purpose. Id.; Paul v. Davis, 424 U.S. 693, 701 (1976); Daniels v. Williams, 106 S.Ct. at 665-666; Davidson v. Connor, 106 S.Ct. at 670.

Finally, the discussion, supra, makes it readily apparent that the instant case is truly fact-bound, unlikely to arise in the future with any regularity. This alone weighs against granting certiorari. Stern, Gressman and Shapiro, Supreme Court Practice, (6th ed. 1986) p.223.

II. EVEN IF A CONSTITUTIONAL VIOLATION CAN BE FOUND OR THERE IS A CONFLICT AMONG THE CIRCUITS, THIS COURT NEED NOT REACH THESE CLAIMS AS DEFENDANTS ARE IMMUNE FROM DAMAGES.

State officials are immune from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 817-818 (1982).

It is plain from the discussion, supra that any constitutional right of the plaintiff which conceivably was violated by the conduct of Dr. Fein, Dr. Koson or Dr. Gilligan cannot possibly be said to have been clearly established at the time of their conduct.[5/] This is true even if they could be found to have violated some state law-created tort or statutory duty. Davis v. Scherer, ___ U.S. ___ 104 S.Ct. 3012, 3020 (1984).

As shown by the careful analysis in Jensen v. Conrad, 747 F.2d at 194-195, a constitutionally based affirmative duty to protect on the party of the govern-

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5/ The First Circuit did not reach this issue in light of its disposition of the case, Gilmore, 787 F.2d at 723, but the district court found that there could be no possible damage liability because of qualified immunity. Gilmore v. Buckley, 608 F.Supp. at 571.

ment and its officials was certainly not clearly established in 1979. The question was specifically left open in Martinez (decided January 1980), and addressed by the Second Circuit in 1981 only to the extent that the state was held responsible for the protection of an individual "'who had been placed in the government's custody or care. . .'" Doe v. New York City Dept. of Social Services, 649 F.2d 134 (2nd Cir. 1981). Bowers v. DeVito, supra in the Seventh Circuit in 1982, and Fox v. Custis, supra, a 1983 Fourth Circuit decision extended somewhat the general concept that a "custodial" or other "special" relationship might give rise to a Fourteenth Amendment claim, but left the

scope of such a qualifying relationship essentially undefined. Jensen, supra, at 193-194.

It cannot be said here that there were, in 1979, constitutional or statutory standards pertaining to a duty to protect even a known potential victim by initiating civil commitment proceedings of which the state defendants should reasonably have known.

Thus, even if a constitutional violation can be found or if this court finds there is a conflict among the circuits, the respondents would be entitled to immunity, and the issue of substantive constitutional law need not be reached. Rice v. Sioux City Cemetary, 349 U.S. at 74-77. Stern, Gressman & Shapiro, supra at 201.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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